NO. 21757

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TYRONE WOODS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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I

STATEMENT OF PLEADINGS AND FACTS DISCLOSING JURISDICTION

On August 17, 1966, the Federal Grand Jury for the Southern District of California returned an indictment in one count charging appellant Tyrone Woods with a violation of Title 18, United States Code, Section 2113(a) [C. T. 2]. 1/ The indictment charged that on or about July 29, 1966, appellant, by force and violence and intimidation, robbed the Security First National Bank, 39th and Western Branch, and teller Sally Miranda of $240.

1/ C. T. refers to Clerk's Transcript.

On August 29, 1966 appellant was arraigned, pleaded not guilty and requested a jury trial [C. T. 16]. A jury trial was commenced on September 26, 1966 before the Honorable Charles H. Carr, United States District Judge.

On September 29, 1966 a verdict of guilty was returned by the jury and on October 19, 1966 judgment of conviction was entered. Appellant was sentenced to the custody of the Attorney General for 15 years [C. T. 22]. On October 26, 1966 appellant filed a timely Notice of Appeal [C. T. 24].

Jurisdiction of the District Court was based on Title 18, United States Code, Section 3231, and Title 18, United States Code, Section 2113. Jurisdiction of this Court is based on Title 28, United States Code, Section 1294(1) and Rule 37(a) of the Federal Rules of Criminal Procedure.

II

STATUTES INVOLVED

Title 18, United States Code, Section 2113(a) provides in pertinent part:

> "Whoever, by force and violence or by intimidation, takes or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, management, or possession of, any bank. . . ." [shall be fined not more than $5,000 or imprisoned not more

than 20 years or both].

III

QUESTIONS PRESENTED

I. Whether the defendant's statement obtained after a full Miranda warning and waiver was properly admitted into evidence.

II. Whether a fingerprint exemplar taken from the defendant in absence of counsel was properly admitted into evidence.

IV

STATEMENT OF FACTS

On Friday, July 29, 1966, at about 1:35 p.m. a lone bandit robbed teller Sally Miranda of the Security First National Bank of $240. In the process, the robber handed Miss Miranda a note (Government's Exhibit No. 1) which threatened her life and demanded all her money [R. T. 46]. Miss Miranda positively identified appellant Woods as the man who robbed her [R. T. 50]. She also testified that during the robbery she pushed a button activating surveillance camera in the bank, and identified the photographs from that

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2/ R. T. refers to Reporter's Transcript.

The note states: "June 11, 1966, $2,200. This is a hold-up. I have a gun and will use it. If anything happens to me someone close to you will be shot. I know where you live, make this look like a large withdrawal. Don't say anything for five minutes. Count the money."

camera (Government's Exhibits 3-12) as being those of defendant Woods while he was committing the robbery [R. T. 51, 90]. A passerby saw appellant fleeing from the bank at about 1:30 p. m. on July 29, 1966 [R. T. 101]. A Los Angeles Police Department Fingerprint Expert testified that partial palm prints taken from teller Miranda's counter at the bank (Government's Exhibit No. 21) and from the demand note (Government's Exhibit No. 1) matched those of defendant Woods (Government's Exhibit No. 24) [R. T. 200-264].

Appellant called witnesses and testified himself to the effect that he was at home in bed at the time of the robbery. Co-defendant Eli Carter, who was identified as the man driving the getaway car, was acquitted by the jury.

Appellant and Eli Carter were arrested at about 3:30 p. m. on August 1, 1966 outside of Carter's house by Sergeant Henry Seret of the Los Angeles Police Department. At the time of arrest, Sergeant Seret advised appellant of his constitutional rights. In substance he told defendant Woods that he was under arrest for robbery, that he had a right to legal counsel at all times, that if he could not afford counsel one would be supplied him, that anything he said could be used against him in further proceedings, and that statements he made must be freely and voluntarily made [R. T. 591, 595, 596, 669, 679, 680]. Seret then told Woods to "think that over on the way to the station. We are not going to talk to you until we get there." [R. T. 569, 596]. Appellant was then taken to the Police Building [R. T. 676].

Approximately one hour later, at 4:30 p.m., Sergeant Seret and defendant Woods were joined by Agent James A. Mills of the Federal Bureau of Investigation in a room at the Police Administration Building [R. T. 669, 685, 705]. At this time, Woods was again advised of his rights by Agent Mills [R. T. 705, 707, 708]. The Agent "advised him of the nature of our investigation to begin with, of the identity of the two men in the room, Sergeant Seret and myself, and then I advised him that he has a right to remain silent and to make no statement. I advised him he has a right to consult with an attorney or anyone else of his own choice, that he has a right to have an attorney present during any interrogation, and prior to answering any questions, and that if he cannot afford an attorney, at a proper time one will be appointed for him." (emphasis added) [R. T. 710]. After being advised of those rights, Woods was asked if he understood the meaning of those rights. He stated that he did [R. T. 707]. He was then asked if he desired to discuss his activities of Friday, July 29, without consulting with an attorney or having an attorney present at that time [R. T. 708].

At this time, there was a brief conversation between Woods and Sergeant Seret which the Agent did not hear [R. T. 706, 710, 711].

Woods' brief statement to Sergeant Seret conflicted slightly with his testimony at trial and led officers to impeaching evidence [R. T. 688, 692, 693].

In substance, the defendant told Sergeant Seret that he was

in bed all day Friday (July 29, 1966) until late afternoon or evening and that he didn't go out until that night [R. T. 688]. At trial, defendant said he stayed in bed until 3:30 p. m. and then had gone to Eli Carter's house [R. T. 409]. He also stated to Sergeant Seret that he owned a 1961 Thunderbird and that it is in a repair shop on Flower Street [R. T. 693]. Evidence at trial showed that defendant Woods had made an $80 payment to the repair shop on July 29, 1966 [R. T. 718].

After making this brief statement, the defendant said, "I don't want to talk any more about this. I want an attorney." [R. T. 692]. At this time, questioning ceased [R. T. 692, lines 11-17; 713, 714]. Appellant denied that Sergeant Seret advised him of his rights or that he spoke to Sergeant Seret [R. T. 441, 442].

V

ARGUMENT

A. ADMISSIONS OF APPELLANT WERE PROPERLY ADMITTED INTO EVIDENCE AFTER A SHOWING THAT CONSTITUTIONALLY REQUIRED WARNINGS WERE GIVEN AND THAT A WAIVER OF RIGHTS WAS OBTAINED PRIOR TO QUESTIONING.

In Miranda v. Arizona, 384 U.S. 436, 444, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966) the Supreme Court held that "the prosecution may not use statements whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards to secure the privilege

against self-incrimination.

It is apparent that such procedural safeguards were used in this case. Appellant claims that the defendant was not adequately advised of his right to have court appointed counsel present during interrogation. However, the record demonstrates that the facts are otherwise.

On August 1, 1966, at 3:30 p.m., the appellant was advised that he had a right to counsel at all times and that if he could not afford counsel one would be supplied him [R. T. 591, 595, 596]. He was then told to "think that over" [R. T. 569, 596]. About one hour later he was advised of his 5th Amendment right to remain silent and to make no statement. He was advised that he would be helped to protect that right by consulting with an attorney or anyone else of his own choosing. He was advised that he had a right to have an attorney present during any interrogation, and prior to answering any questions. He was advised that if he did not have funds, at a proper time an attorney would be appointed [R. T. 710]. Woods indicated that he fully understood those rights and then had a brief conversation with Sergeant Seret. When he indicated that he had said enough and wanted an attorney, questioning immediately ceased [R. T. 692]. A knowing and intelligent waiver of rights is shown by the fact that Woods was advised of his rights by Seret and given an opportunity to dwell upon them; that he was again advised fully by Agent Mills immediately prior to the statement; that he stated he understood his rights; that he chose to speak briefly without an attorney after he was asked whether he desired to make a

statement without an attorney; and that he changed his mind after making the brief statement, refused to say anything more, and asked for an attorney. Under these particular facts and circumstances the waiver was sufficient under the Miranda standards. United States v. Hayes, 385 F.2d 375 (4th Cir. 1967).

The above indicates that the Police Officer and FBI Agent scrupulously complied with the Miranda directives although the interview in question occurred little more than a month after that case was decided. This record clearly shows that the appellant was explicitly advised that he had the right to court appointed counsel prior to answering any questions and during any interrogation.

Miranda did not require that each police station have a lawyer present to advise prisoners. 384 U.S. at p. 474. In explaining the meaning of its decision, the Miranda court stated:

> " . . . if police propose to interrogate a person they must make it known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation."
> 384 U.S. at p. 474.

The Miranda court further admonishes:

> "The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by the

defendant." 384 U.S. at 476 (emphasis added).

In Keegan v. United States, 385 F.2d 260 (9th Cir. 1967), this Court held the following warning to be an effective equivalent.

> "You don't have to say anything without the presence of an attorney. Anything that may be said out of the presence of an attorney could be held against you in a court of law. If you don't have funds to pay for an attorney, we will appoint one." Keegan, supra, at 262, 264.

"Surely Miranda is not a ritual of words to be recited by rote according to didactic niceties." Coyote v. United States, 380 F.2d 305 (10th Cir. 1967). What Miranda does require is meaningful advice to the unlettered and unlearned in language which can be comprehended and on which he can knowingly act. Coyote, supra, at page 308. The Coyote court accordingly held that warning to the effect that the defendant " . . . can talk to a lawyer or anyone before saying anything, and that the judge will get me a lawyer if I am broke" was sufficient under Miranda.

Clearly the warning and waiver in this case constituted sufficient safeguards, and appellant's privilege against self-incrimination was thoroughly protected.

B. THE FINGERPRINT EXEMPLAR WAS OBTAINED LAWFULLY AND WAS PROPERLY ADMITTED INTO EVIDENCE.

Appellant admits that he had no constitutional right to refuse to furnish his fingerprints. He cites no case which holds that he is entitled to counsel when giving fingerprints. Nor does he offer any cogent reasons which would support that dubious conclusion.

United States v. Wade, 388 U.S. 218 (1967) applies to an entirely different situation, and even then applies only to identification confrontations occurring after June 12, 1967 which is approximately one year after the fingerprint proceedings in this case. Stovall v. Denno, 388 U.S. 293, 87 S. Ct. 1967, 18 L. Ed. 2d 1199.

The applicability of Gilbert v. California, 388 U.S. 263 (1967) is well stated by the Supreme Court in its discussion of the obtaining of handwriting from Gilbert in the absence of counsel.

> "The taking of the exemplars was not a 'critical' stage of the criminal proceedings entitling petitioner to the assistance of counsel. Putting aside the fact that the exemplars were taken before the indictment and appointment of counsel, there is minimal risk that the absence of counsel might derogate from his right to a fair trial. Cf. United States v. Wade, supra. If, for some reason, an unrepresentative exemplar is taken, this can be brought out and corrected through the adversary process at trial since the accused can make an unlimited number of

additional exemplars for analysis and comparison by government and defense handwriting experts. Thus, 'the accused has the opportunity for a meaningful confrontation of the [State's] case at trial through the ordinary processes of cross-examination of the [State's] expert [handwriting] witnesses and the presentation of the evidence of his own [handwriting] experts.' " United States v. Wade, supra, at 227-228.

VI

CONCLUSION

Since the statements and fingerprint exemplars were lawfully obtained and properly admitted into evidence, the judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Michael D. Nasatir
MICHAEL D. NASATIR